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ABSTRACT

Legal challenges to state compulsory attendance laws have emphasized four interrelated constitutional claims. Under provisions of the free exercise clause of the First Amendment, parents have challenged the state's authority to require public school attendance in lieu of home instruction and private, religious organizations have refused to comply with state regulation of nonpublic schools. Alternatively, parents and religious organizations have asserted violations of the establishment clause of the First Amendment in attacking state regulation of private, religious school operations. In those cases in which state compulsory attendance requirements impose criminal penalties for nonconformance, challenges based upon a denial of due process have been addressed. Finally, parents have asserted a right to direct the education of the child under various constitutional theories implicating privacy, equal protection, and due process guarantees. An examination of court decisions in these areas reveals that state compulsory attendance laws are vulnerable where delegations of legislative power exceed the authority of administrative agencies, where ambiguities in statutory language permit unbridled discretion in enforcement policy, and where implementation of policies denies fundamental rights secured by state and federal constitutions. For these reasons, a conscientious review and revision of state compulsory attendance laws may be warranted in many jurisdictions. (MLF)

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Legal Challenges to Compulsory Attendance Laws

Joseph C. Beckham

The United States Supreme Court has held that education is not a fundamental constitutional right, although it is an important interest which, if denied, may receive "heightened" review by a federal court.[1] Education, while not an express right under the federal constitution, is mandated under state constitutional provisions designed to insure a system of public schools. Compulsory attendance laws reflect the state's mandate to insure educational opportunity and provide for this important interest.

The state's responsibility to insure quality education can be deduced from state constitutional mandate and statutory enactment. In most jurisdictions, constitutional provisions, statutory law and regulatory standards may be coupled with judicial pronouncements to confirm a compelling state interest in the implementation of compulsory attendance laws. The extension of these laws to permit state regulation of private schools has been acknowledged by federal courts.[2]

The United States Supreme Court recognized and articulated those legitimate state interests in the education of children which are the source of compulsory attendance requirements.[3] The court noted that education prepares the individual for effective and intelligent participation in an open, democratic political system and enables the citizen to be a self-sufficient and self-reliant member of society.[4] Furthermore, the state has a legitimate interest in seeking "to develop the latent talents of its children," preparing them "for the life style that they may later choose."[5] Periodic challenges to the state's authority to require compulsory attendance have focused on the

1. *See* Plyler v. Doe, 457 U.S. 202 (1982), and San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).

2. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602 (1971); Board of Educ. v. Allen, 392 U.S. 236 (1968); and Pierce v. Society of Sisters, 268 U.S. 510 (1925).

3. Wisconsin v. Yoder, 406 U.S. 205 (1972).

4. *Id.* at 221.

5. *Id.* at 240 (concurring opinion of Justice White, joined by Justice Brennan and Justice Stewart).

parent or nonpublic school's interest in determining what constitutes an adequate education. Parents have asserted a right to provide home instruction as an alternative to public schools. Private institutions, often with the support of parent groups, have challenged the state's authority to regulate nonpublic institutions. In these instances, courts have been compelled to balance competing state and private interests in order to delineate the scope of compulsory attendance requirements.[6]

Legal challenges to state compulsory attendance laws have emphasized four interrelated constitutional claims. Under provisions of the free exercise clause of the first amendment, parents have challenged the state's authority to require public school attendance in lieu of home instruction and private, religious organizations have refused to comply with state regulation of nonpublic schools. Alternatively, parents and religious organizations have asserted violations of the establishment clause of the first amendment in attacking state regulation of private, religious school operations. In those cases in which state compulsory attendance requirements impose criminal penalties for nonconformance, challenges based upon a denial of fifth and fourteenth amendment due process have been addressed. Finally, parents have asserted a right to direct the education of the child under various constitutional theories implicating privacy, equal protection, and due process guarantees.

Free Exercise

The first amendment has been interpreted to prohibit states from passing laws which deny free exercise of religion. Initially, the party alleging a violation of the free exercise clause must establish that the objection to state action is rooted in genuine religious doctrine or belief and that the state action imposes a burden on the exercise of that belief. Courts will carefully assess whether a claim based upon free exercise of religion can be characterized as predicated upon religious belief and will consider both the intent and the application of the state law in determining whether there is an undue burden, direct or indirect, on free exercise.[7]

In *Wisconsin v. Yoder*,[8] the United States Supreme Court considered the religious beliefs of Amish parents who were convicted of violating Wisconsin's compulsory school attendance law by refusing

6. M. McCarthy & P. Deignan, What Legally Constitutes an Adequate Public Education? 29-33 (1982).

7. *See* Abington Township v. Schempp, 374 U.S. 203 (1963); Sherbert v. Verner, 374 U.S. 398 (1963); and Gitlow v. New York, 268 U.S. 652 (1925).

8. 406 U.S. 205 (1972).

to send their children to public or private school beyond the eighth grade. The High Court reversed the convictions after giving close scrutiny to the religious beliefs and unique society, founded upon religious doctrine, which prevailed among the Amish. After recognizing that the Amish way of life was deeply rooted in an historical and religious tradition which was contrary to the "wordly," "intellectual," and "competitive" nature of schooling at the secondary school level, the Court balanced the state's interest in compulsory education against the sincere religious beliefs of the Amish.

Given the unique facts and circumstances associated with the Amish, the Court held that Wisconsin's interest in compulsory education beyond the eighth grade was not so compelling as to override the free exercise of a sincerely held religious belief. A primary factor which influenced the Court was the recognition that Amish children received formal public education through the eighth grade and then obtained informal vocational training to enable them to assimilate into a self-contained, self-sufficient religious and social community with a long history as a successful segment of American society.[9]

The Fourth Circuit Court of Appeals applied two aspects of the *Yoder* rationale in determining whether a North Carolina parent's religious beliefs justified his refusal to comply with state compulsory attendance laws. In determining the extent to which the North Carolina parent's religious beliefs compared with those espoused by the Amish, the court distinguished the parent's refusal to enroll his children in any public or nonpublic school for any length of time and questioned the parent's expectation that the children would be fully integrated into modern society at age eighteen.

In addition, the court found that North Carolina's interest in compulsory education was of sufficient magnitude to override the interest claimed by the parent under the free exercise clause of the first amendment. Basing its decision on a review of North Carolina statutes requiring public and nonpublic schools to meet administration and reporting requirements for competency testing, attendance, disease immunization, and health and safety regulations, the court concluded that North Carolina had not abdicated its interest in the quality of education received by students in nonpublic schools and had maintained a compelling interest in compulsory education for the children of the state.[10]

In rejecting a parent's request for declaratory and injunctive relief which would permit him to educate his children in the home, the

9. *Id.*

10. Duro v. District Attorney, 712 F.2d 96 (4th Cir. 1983).

North Carolina Court of Appeals has held that home instruction would not meet statutory qualifications as a nonpublic school. The North Carolina law requiring compulsory attendance defined "schools" to include "all public schools and such nonpublic schools as have teachers and curricula that are approved by the State Board of Education."[11] The court concluded that "school" meant an educational institution and did not include home instruction.

Even assuming that the parent had a protected religious belief which was infringed by the state compulsory attendance law, the court found that the state had an overriding interest in assuring that the children were educated in a school. Noting that the state had no means to insure that children who are at home are receiving an education, the court held that the state's interest in compulsory education outweighed the parent's interest in providing education at home.[12]

A Nebraska parent sought to educate his two children, ages seven and sixteen, at home. Pertinent state statutes required that schools meet certain standards in order to operate, including state inspection and approval of public and private schools. In a previous criminal action, Morrow was acquitted of a charge of violating state compulsory attendance laws. Since Morrow did not possess state certification, a requisite to the operation of a private school in Nebraska, the state successfully enjoined him from operating a private school for the education of his children. In its opinion, the Nebraska Supreme Court concluded that Morrow's sincerely held religious beliefs would not justify a refusal to comply with Nebraska's education law, since the state had a compelling interest in the education of Morrow's children that outweighed his right of free exercise.[13]

A large body of case law confirms the state's authority to compel private schools to meet state compulsory attendance law standards. Requirements that private institutions hire teachers with specified training, offer prescribed subjects, and privide minimum hours of instruction have been recognized in many jurisdictions. Nebraska's Supreme Court recognized that state's critical interest in the provision of education and upheld reporting and curricular requirements for religious schools.[14] North Dakota's highest court has ruled that a private religious school's compliance with state uniform course mandates is not so burdensome as to unduly restrict free exercise.[15]

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11. N.C. Gen. Stat. § 115C-378.
12. Delconte v. State, 308 S.E.2d 898 (N.C. App. 1983).
13. State of Nebraska *ex rel.* Douglas v. Morrow, 343 N.W.2d 903 (Neb. 1984).
14. State *ex rel.* Douglas v. Faith Baptist Church, 207 Neb. 802, 301 N.W.2d 571 (1981), *appeal dismissed,* 454 U.S. 803 (1981).
15. State v. Shaver, 294 N.W.2d 883 (N.D. 1980).

The Michigan Department of Education appealed from a trial court's finding that Michigan laws requiring certification of teachers in nonpublic schools and mandating certain courses and curricular standards in such schools violated the first amendment's provision on free exercise of religion. The state's compulsory education statutes allowed for a child to meet requirements by attending "a state approved nonpublic school, which teaches subjects comparable to those taught in the public schools to children of corresponding age and grade."[16] The state's regulatory scheme consisted of a simple review of nonpublic school curricula, which involved submission of enrollment records, teacher qualifications, and courses of study.

In concluding that the state's requirements did not violate the constitutionally significant religious group's free exercise rights, the court found no regulatory burden on religious belief. In balancing any minimal burden on the religious group against the state's interest in regulating quality of education, the court noted that state constitutional and statutory law recognized the importance of providing education for youth and found that absent the regulatory policy the state would have no reasonable assurance that its recognized interest would be realized. Further, the court found the state's interest sufficiently urgent to be classified as "compelling," satisfying the standard that any intrusion on first amendment rights can be justified only if it is a compelling state interest.[17]

A private religious school sought to operate without meeting the required program approval and attendance reporting requirements of the state of Nebraska. In authorizing injunctive relief, the Nebraska Supreme Court ruled that state reporting and approval requirements were reasonable, based upon the state's compelling interest to mandate minimum educational standards for nonpublic schools. "All private, denominational, and parochial schools in the State of Nebraska ... shall be subject to and governed by the provisions of general school laws of the state so far as the same apply to the grades, qualifications, and certification of teachers and promotion of pupils."[18] The court reasoned that a claim of free exercise of religion would not suffice to allow a private school to operate "completely unfettered by reasonable government regulations as to the quality of education furnished."[19]

16. Mich. Stat. Ann. § 15.41561(3) (a) (Callaghan).

17. Sheridian Rd. Baptist Church v. Department of Educ., 348 N.W.2d 263 (Mich. Ct. App. 1984).

18. Neb. Rev. Stat. § 79-1701 (1976).

19. State *ex rel.* Douglas v. Faith Baptist Church, 207 Neb. 802, 301 N.W.2d 571, 579 (1981), *appeal dismissed*, 454 U.S. 803 (1981). *See also* State *ex rel.* Douglas v. Calvary Academy, 348 N.W.2d 898 (Neb. 1984); State *ex rel.* Kandt v. North Platte Baptist Church, 345 N.W.2d 19 (Neb. 1984).

There have been cases in which the burden placed by the state upon the private religious school is so onerous as to invalidate the state law. In such instances, the regulations amounted to constructive abolition of the private school, or, alternately, they so pervasively regulated the enterprise as to virtually eliminate any distinction between public and private schools. Educational standards which required private schools to strictly conform to instructional time, course curriculum, and local board discretionary policies have been held by the Ohio Supreme Court to be too extreme an effort to achieve equivalency.[20] Prohibitions on private school operation while public schools were in session, coupled with rigid requirements for adoption of public education textbooks and curricula, have been found to violate federal constitutional rights.[21]

The Kentucky Supreme Court has held that state accreditation requirements for nonpublic schools violated a state constitutional provision prohibiting the state from compelling parents to send their children to a school to which the parent was conscientiously opposed. Recognizing the state's interest in insuring adequacy of education, the court nevertheless regarded the imposition of accreditation, teacher certification, and approved textbook requirements to be an onerous burden on freedom of conscience. As a less burdensome alternative to effectuate the state's purpose, the court proposed legislative adoption of an appropriate standardized achievement test which could assess the outcomes of private schooling. The court reasoned that such a measure would enable the state to assess educational quality, identify schools which met acceptable standards, and close schools which failed to meet the standards.[22]

A religious group's refusal to comply with Nebraska school laws related to the operation of a religious school led to a state court order securing the church and school (one building) with padlocks on dates and at times other than during weekend and Wednesday evening religious services. In reversing the order, the Eighth Circuit Court of Appeals concluded that the state's interest in preventing operation of the school, although compelling, could be achieved through less restrictive means than through court orders which effectively denied both religious freedom and freedom of speech and association.[23]

Religious schools, led by the Maine Association of Christian Schools, challenged the constitutionality of state approval require-

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20. State v. Whisner, 351 N.E.2d 750 (Ohio 1976).

21. Farrington v. Tokushige, 273 U.S. 284 (1927).

22. Kentucky State Bd. of Educ. v. Rudasill, 589 S.W.2d 877 (Ky. 1979), *cert. denied*, 446 U.S. 938 (1980).

23. McCurry v. Tesch, 738 F.2d 271 (8th Cir. 1984).

ments for the operation of private schools on the ground that church schools were integral parts of the religious ministry and not susceptible to state control. While declining to resolve this issue, the federal district court was obliged to address the state's authority to enjoin operation of the religious schools and to prosecute the school leadership for inducing habitual truancy. The court found no specific statutory obligation compelling the religious schools to seek approval and ordered state school officials not to seek prosecutions under truancy laws, as the operation of "unapproved" schools did not constitute an inducement to habitual truancy. While finding no requirement that the religious schools seek approval, the district court did make clear that a remedy at law existed in a truancy action against the parent if it could be established that the children educated in the religious school were not receiving equivalent education. The court's decision emphasized truancy prosecutions over school closings for the "singularly sufficient reason that the Maine Legislature has *mandated* truancy-law enforcement and has never *authorized* the closing of a private school by courts or administrators for any reason relevant to the present action."[24] (emphasis in the original)

Establishment Clause

In determining whether a state law violates the establishment clause of the first amendment, the United States Supreme Court has applied a three-part test. The state law must have a secular legislative purpose, a primary effect which neither advances nor inhibits religion and *a consequence which would not foster excessive government entanglement with religion.*[25] The latter test, focusing on the degree of entanglement between the religious group and state agents, does not prohibit regulatory oversight by the state, particularly when such oversight can be characterized as occasional or period contact as opposed to "a comprehensive, discriminating and continuing state surveillance."[26]

Reasonable licensure requirements for private religious institutions granting education degrees have been upheld by the New Jersey Supreme Court and found not to violate the establishment clause of the first amendment. In applying state licensure requirements to a private, fundamentalist Christian College which sought to award baccalaureate degrees, the court concluded that the indirect burden

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24. Bangor Baptist Church v. State of Maine, Dept. of Educ., 576 F. Supp. 1299, 1326 (D. Me. 1983).
25. Wolman v. Walter, 433 U.S. 229 (1977).
26. Lemon v. Kurtzman, 403 U.S. 602, 619 (1971).

on free exercise of religion was not so substantial as to override the state's compelling interest in the maintenance of uniform academic standards which would preserve the basic integrity of the degree. In addressing the issue of excessive entanglement, the court found licensure regulations did not require active involvement in or comprehensive surveillance of the college's instructional program.[27]

Vagueness

The constitutional doctrine of due process, as embodied in the fifth and fourteenth amendments, prohibits the federal government or a state from holding individuals responsible for conduct which the individual could not reasonably understand to be proscribed. This principle of due process, otherwise known as the vagueness doctrine, has been applied to require that a criminal statute be sufficiently definite to give a person of ordinary intelligence fair notice of the behavior which is prohibited.[28] Absent such definiteness, enforcement of the law becomes subjective and potentially arbitrary and capricious.

Public education policy standards imposed on private schools are not likely to attain the degree of specificity required in cases involving due process for criminal misconduct. It is legally sufficient that requirements imposed on private schools are uniformly applied to public sector schools and are as reasonably precise as the subject matter permits.[29] However, the enforcement of compulsory school attendance laws against parents often involves prosecution under truancy provisions which compel rigorous due process protection that would prohibit vagueness.

State courts have historically addressed the meaning of "school" as it appears in compulsory education requirements.[30] In most instances, the meaning is determined from common usage or literal translation. Judicial interpretation has not yielded a uniform definition of the term, however, and one authority has noted an increase in litigation, particularly in cases in which parents have insisted that home instruction qualifies as a form of schooling within the require-

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27. New Jersey State Bd. of Educ. v. Shelton College, 448 A.2d 988 (1982). *See also* Minami v. Andrews, 651 P.2d 473 (Hawaii 1983) (licensing requirement for private religious school upheld).

28. *See* Grayned v. City of Rockford, 408 U.S. 104 (1972).

29. Scoma v. Chicago Bd. of Educ., 391 F. Supp. 452 (N.D. Ill. 1974).

30. *See, e.g.*, Grigg v. Virginia, 224 Va. 356, 297 S.E.2d 799 (1982) (home instruction would not qualify as a "school" within the meaning of compulsory attendance law); Voisard v. County of Lake, 169 N.E.2nd 805 (1960) (day camp offering systematic instruction in recognized academic subjects was a "school" although a private enterprise); and State v. Peterman, 70 N.E.2d 550 (1904) (home instruction offered by a former public school teacher qualified as a school experience).

ments of compulsory attendance laws.[31]

Wisconsin's compulsory school attendance law, which provided that a person having control of children between the ages of six and eighteen had to cause that child to regularly attend either a public or private school, was struck down by the Supreme Court of Washington as vague.[32] In the principal case, a local school superintendent had informed a parent whose child attended a private school that compliance with the compulsory attendance law required the parent to enroll his child in a private school listed in the state's directory. Since the private school in which the child was enrolled was not listed, the parent was convicted and served two consecutive ninty-day jail sentences. Reversing this decision, the court found the state law silent on the question of what constituted a private school. In its ruling, the court admonished the state legislature to specify the meaning to be attributed to the phrase "private school" so that neither citizens nor the court would be obliged to guess at its meaning.

Georgia's compulsory school attendance law provided that every parent having control of a child between the ages of seven and sixteen shall enroll the child in and send the child to a public or private school.[33] Two parents arrested for failing to enroll their children under provisions of the law defended on the grounds that their three school age children were being taught at home in a private school operated by the parents. Neither parent possessed a teaching certificate or any formal training or experience as a teacher.

The Supreme Court of Georgia held the state's compulsory school attendance law void as unconstitutionally vague. The meaning reasonable persons would ascribe to the term "private school" was considered insufficiently definite. The failure to define the phrase "private school" or to prescribe criteria which would allow qualification as a private school led the court to conclude: "Although we agree that the word 'school' clearly puts one on notice that an organized education must be provided to the child, there are many questions concerning the scope, nature and place of the education which are left unanswered by statute or applicable authorities."[34]

Because the phrase "private school" was susceptible to alternative

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31. Lines & Bray, *What Is a School?*, 16 West's Educ. L. Rep 2, 371-77 (1984).

32. State v. Popanz, 332 N.W.2d 750 (1983). *See also* State v. White, 112 Wis. 178, 332 N.W.2d 756 (1983) (reversing a conviction despite defendant's plea of guilty to a violation of compulsory attendance laws); State v. Davis, 598 S.W.2d 189 (Mo. App. 1979) (legislature admonished to explicate what constitutes an adequate public school education so that eqivalence of home instruction could be assessed).

33. Ga. Code Ann. § 20-2-690.

34. Roemhild v. State, 308 S.E.2d 154, 158 (Ga. 1983).

interpretations, the court found that the application of the compulsory attendance law would be susceptible to ad hoc or subjective standards which might pose the danger of arbitrary and discriminatory enforcement. Such an inadequacy was demonstrated by the lack of any minimum standards which could be communicated to the parents in order that they might determine whether they were in compliance with state law.

In dissent, three judges insisted that the state's compulsory education law should not be destroyed simply because it did not define all phrases in a manner characteristic of bureaucratic "genius." Argued the dissent:

> In order to resolve this issue in total accord with the established longevity of compulsory education, with the precedents in our state law, and with ... common sense, we need only inquire as to whether or not the activities provided by the (parents) met the dictionary definition of school as "an organized source of education or training as (1) an institution for the teaching of children."[35]

While Wisconsin and Georgia decisions have recognized vagueness in the application of criminal sanctions for failure to comply with compulsory attendance laws, the Supreme Court of Arkansas has concluded that statutory language which specifies that parents are to "send" children to a "public, private or parochial school" is sufficiently clear to inform one of average intelligence as to the meaning of the law. Such a provision, reasoned the court, when applied to one who sought to educate his child at home, would give adequate notice that the home instruction program violated common understanding of the term "school" as an institution to which the child is sent.[36]

In some instances, states will undertake truancy actions against the child, rather than prosecute the parent. The Kansas Code for Care of Children defines a child in need of care as one who is less than eighteen years of age not attending school.[37] In upholding a finding that two Kansas children were "in need of care" the Kansas Supreme Court ruled a home instruction program offered by a parent who possessed a high school diploma but no teacher certification did not meet Kansas statutory requirements for instruction. Kansas statutes on compulsory attendance defined a nonpublic school as a "private, denominational or parochial school taught by a competent instructor for a period of time which is substantially equivalent to

35. *Id.* at 160.
36. Burrow v. State, 669 S.W.2d 441 (Ark. 1984).
37. Kan. Stat. Ann. 1982 Supp. § 38-1502(6).

the period of time the public school is maintained in the school district."[38]

In finding that there was substantial competent evidence on which to base a finding that home instruction was not a school within the meaning of Kansas law, the court gave particular attention to the lack of teacher certification or teaching experience and insufficient lesson planning or scheduling. Although incorporated, the home instruction "school" was not accredited and only the two siblings were taught. In concluding that such an arrangement would not suffice, the court added:

> We find the (parent's) plan, though well intentioned, a thinly veiled subterfuge attacking compulsory school attendance. If such a family arrangement will serve as a substitute for school there is no compulsory school attendance.[39]

Parent's Right to Direct Education

Challenges to compulsory attendance laws which invoke the parent's right to direct the education of the child might be predicated upon an implied right to privacy, equal protection gurantees of the fourteenth amendment, or liberty interests insuring due process of law. Courts have been reluctant to grant exceptions to compulsory attendance laws on constitutional grounds, particularly when the asserted right to guide or direct the child's education is poorly defined or conflicts with a substantial state interest such as compliance with a desegregation order.[40]

In a novel challenge to the enforcement of criminal sanctions against the parent for violation of compulsory attendance laws, a New Mexico appellate court was asked to assess whether the exclusion of home instruction as one means of satisfying the compulsory attendance law violated equal protection under the state constitution or the fourteenth amendment. The appellate court concluded that such an exclusion bears a rational relationship to a legitimate state purpose in that the exclusion removes the child from the supervision of the immediate family and exposes that child to at least one other set of values, attitudes, or lifestyle.[41] Not considered on appeal was

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38. Kan. Stat. Ann. § 72-1111(a)(2).

39. *In re* Sawyer, 672 P.2d 1093, 1097 (Kan. 1983).

40. *See* State v. Chavis, 263 S.E.2d 356 (N.C. App. 1980), *cert. denied*, 267 S.E.2d 679 (N.C. 1980).

41. State v. Edgington, 663 P.2d 374 (N.M. Ct. App. 1983). *But see* Strasnider v. Strasnider, 686 P.2d 981 (N.M. Ct. App. 1984) (program established by parent at location other than home, in which older sister taught six minor children and three

the question of whether the law violated privacy or free exercise of religion under the Federal Constitution.

The West Virginia Supreme Court upheld the conviction of parents for violation of compulsory attendance laws despite a claim that the parents had a right to educate their children in the home without seeking approval of the local school board. State law allowed an exemption from school attendance for children instructed in the home provided the local board attests to the adequacy of the instruction provided. In concluding that such a requirement was reasonable, the court emphasized that an assessment of what constitutes a "qualified instructor" was a decision to be made in light of the instructor's ability to provide diverse educational experiences which must "develop the minds, bodies and social morality (of pupils) ... to prepare them for useful and happy occupations, recreation and citizenship."[42]

In recognizing the state's interest and power to impose reasonable regulations on the provision of basic education, the Supreme Court of Maine ruled that a requirement that parents seek approval for home instruction plans was held to be proper. The parents sought to educate their children in the home, but refused to submit a plan for home education. In an appeal from civil statutory fines based upon a finding that the children were habitually truant, the court was asked to balance the parent's claim of a right to educate the child in the home, predicated on a liberty interest involving fourteenth amendment due process, against the state's requirement that parents obtain the prior approval of public school officials for home education programs. In ruling the regulatory requirement reasonable, the court found that there was no actual denial of the parent's asserted right to educate the child at home and directed the parent to keep the children in public school pending approval of a home instruction plan submitted to the local board of education.[43]

A child was found to be truant under Nebraska law despite the fact that the parent withheld the child from attending because he allegedly suffered from a form of enuresis which caused him embarrassment at school. The parents had requested an exception to the compulsory attendance law out of their concern for the child's wel-

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other children unrelated to the family, did qualify as a private school under New Mexico statutes requiring compulsory attendance).

42. State v. Riddle, 285 S.E.2d 359, 364 (W. Va. 1981).

43. State v. McDonough, 468 A.2d 977 (Me. 1983). *See also In re* Kilroy, 467 N.Y.S.2d 318 (N.Y. Fam. Ct. 1983) (Parents had no right to refuse to permit education authorities to visit their home instruction site in order to determine whether the instruction was "equivalent" to that which satisfies the state's compulsory education statute).

fare: the school board denied the request. On appeal, the Nebraska Supreme Court affirmed the truancy decision, granting substantial deference to the school board's authority to deny exemption and concluding that parental permission to be absent from school would not change the nature of the violation.[44]

Conclusions

State compulsory attendance laws are subject to legal challenge on a number of constitutional grounds. These statutes are comprehensive enactments which often involve provisions specifying the "adequacy" of educational programs, prohibiting certain forms of education, and elaborating penalties for failure to conform to provisions for appropriate schooling. As such, these laws are vulnerable where delegations of legislative power exceed the authority of administrative agencies, where ambiguities in statutory language permit unbridled discretion in enforcement policy, and where implementation of policies denies fundamental rights secured by state and federal constitutions.

State and local school boards are faced with the responsibility to implement legislative policies and enforce sanctions for noncompliance with compulsory attendance laws. As such, these agencies are vulnerable to legal attacks on both the formulation and implementation of policy. Absent express statutory authority, state and local boards are not generally empowered to regulate private education nor can these entities enforce civil or criminal sanctions for noncompliance when state statutes fail to specifically define the nature of the wrong.

The broad discretion once accorded to state and local school boards in rule-making and enforcement of compulsory attendance laws has been subject to increasing scrutiny by state and federal courts as parents and private religious groups seek to define the limits of governmental intrusion into the area of education of the young. While there is little constitutional doctrine that would prohibit a state legislature from setting minimum standards for private schools, many state legislatures have not acted to specify what qualifies an educational entity as a private school or to delineate the state's scope of authority in regulating or enforcing compulsory attendance laws.[45] As judges encounter an increasing number of legal

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44. *In re* K.S., 346 N.W.2d 417 (Neb. 1984). *See also In re* Pierce, 451 A.2d 363 (N.H. 1982) (Manifest educational hardship must be established to justify approval of home instruction.

45. *See* Lines, *Private Education Alternatives and State Regulations*, 12 J. L. & Educ. 189 (1983).

challenges to compulsory attendance policies, they are likely to rebel at the notion that courts should extend state authority where the legislature has failed to do so. The corresponding dilemma for state and local school boards is whether to implement policies that may be subject to legal attack and that may result in extraordinary costs and a diminution of state and local authority to regulate the provision of educational services.

While the prospect of litigating some issues may hold the promise of clarifying the state's authority to implement compulsory attendance laws, a conscientious review and revision of state compulsory attendance laws may be warranted in many jurisdictions. The formulation of policies that clarify legislative intent with regard to the regulation of private schools, and that specify the instrumentality as well as the purpose and scope of authority of those agencies which must enforce compulsory attendance, will be an imperative in many jurisdictions, some of which have not considered the meaning and intent of compulsory attendance laws in over a century of progressive educational reform in the public sector.